91-1657

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

Charlene LEATHERMAN, et al.,

Petitioners

V.

TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT, et al.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Don Gladden*
&
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April, 1992

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QUESTIONS PRESENTED

1. On a complaint brought pursuant to 42 U.S.C. Section 1983 alleging liability against a local governmental entity for constitutional violations caused by its failure to adequately train and supervise its police officers, is dismissal of the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure due to the complaint's failure to satisfy a "heightened pleading" requirement:

A) prohibited by the system of "notice" pleading mandated by Rule 8 of the Federal Rules of Civil Procedure; or

B) prohibited by the Rules Enabling Act, 28 U.S.C. Section 2072(b), which provides that rules of practice and procedure shall not abridge, enlarge or modify any substantive right?

LIST OF PARTIES

Petitioners from Judgment Below[1]

Charlene Leatherman and
Kenneth Leatherman,
Individually and as Next of Friend of
Travis Leatherman;
Gerald Andert;
Kevin Lealos and Jerri Lealos,
Individually and as Next of Friends of
Travor Lealos and
Shane Lealos;
Pat Lealos;
Donald Andert

Respondents

The Tarrant County Narcotics Intelligence and Coordination Unit;
Tim Curry, in his Official Capacity as Director of the Tarrant County Narcotics and Coordination Unit of Tarrant County, Texas;
Don Carpenter, in his Official Capacity as Sheriff of Tarrant County, Texas;
City of Lake Worth, Texas;
City of Grapevine, Texas

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[1]Lucy Andert, formerly a Plaintiff in the District Court, is deceased. The executors of Mrs. Andert's estate, through their counsel, have informed her counsel in this case that they do not desire to proceed with litigation of her claims herein.

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner herein prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review that Court's February 28, 1992 Judgment and Opinion in this proceeding.

OPINIONS BELOW

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered February 28, 1992, and from which review is sought, are reported at 954 F.2d 1054 (5th Cir. 1992), and are attached in the Appendix to this Petition at page 1a.

The Judgment and Memorandum Opinion of the United States District Court for the Northern District of Texas entered January 22, 1991, and from which Petitioners appealed, are reported at 755 F.Supp. 726 (N.D. Tex. 1991), and are attached in the Appendix of this Petition at page 25a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered the Judgment from which review is sought on February 28, 1992. Jurisdiction is conferred upon this Court by 28 U.S.C. Section 1254(1).

STATUTES AND RULES INVOLVED

This case arises under the Civil Rights Act of 1871, 42 U.S.C. Section 1983, and the Questions Presented involve another statute, the Rules Enabling Act, 28 U.S.C. Section 2072, and Rule 8 of the Federal Rules of Civil Procedure. These statutes and rule are reprinted in the Appendix to this Petition at pages 55a-56a.

STATEMENT OF THE CASE

This case arises out of two searches of private residential dwellings conducted by law enforcement officers in Tarrant County, Texas, on January 30, and May 30, 1989. The Petitioners herein alleged in their First Amended Complaint, inter alia, that the searches in question were carried out in an unconstitutional manner in violation of the Fourth

Amendment, and that the Respondent local governmental entities, through their respective failures to adequately train and supervise their police personnel, are liable to Petitioners under 42 U.S.C. Section 1983. After all Respondents had filed their answers to Petitioners' First Amended Complaint, Respondents TCNICU and Tarrant County on April 17, 1990 filed their second "Motion to Dismiss or for Summary Judgment."

On June 7, 1990 Respondents TCNICU and Tarrant County filed a motion for a protective order seeking to insulate them from discovery sought by Petitioners in their "Amended Request for Production of Documents." (R.II,249). On June 18, 1990, Petitioners filed their response to Respondents' TCNICU and Tarrant County's Motion to Dismiss or for Summary Judgment, and expressly requested therein

that the District Court defer consideration of the Respondents' motion for summary judgment, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, on the ground that the discovery sought by Petitioners in their Amended Request for Production of Documents, to which the Respondents objected, would provide facts essential to their opposition to Respondents' motion for summary judgment. (R.II, 362,390-391). On July 20, 1990 Petitioners filed a motion for a hearing on Respondents TCNICU and Tarrant County's Motion for a Protective Order, and requested therein that the District Court set an early date for the hearing on Respondents' motion for protective order.

On December 31, 1990, the District Court granted Respondents' TCNICU and

Tarrant County's Motion for a Protective Order and denied Petitioners' request for a hearing on that motion. (R.II,453). On January 22, 1991, barely three weeks later, the District Court granted Respondents TCNICU and Tarrant County's motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the ground that Petitioners' First Amended Complaint did not satisfy the Fifth Circuit's "heightened pleading" requirement. In the alternative, the District Court granted Respondents TCNICU and Tarrant County's motion for summary judgment, and thereafter sua sponte dismissed and granted summary judgment in favor of Respondents City of Grapevine and City of Lake Worth with respect to the remainder of the Petitioners' claims. (R.II,457).

On appeal, the United States Court of Appeals for the Fifth Circuit, in a majority opinion written by the Honorable Irving L. Goldberg, affirmed. Pet. App. at page 2a, 954 F.2d at 1055. The majority opinion for the Court of Appeals rested its decision to affirm solely on the ground that the Petitioners' First Amended Complaint had failed to satisfy the Fifth Circuit's "heightened pleading" requirement. See Pet. App. at page 14a n.6, 954 F.2d at 1058 n.6.

In a specially concurring opinion, also written by Judge Goldberg, Judge Goldberg noted that he was "impressed by the wealth of authority plaintiffs cite in support of their position" challenging the heightened pleading requirement, Pet. App. at page 23a-24a, 954 F.2d at 1061, but noted further that in light of preexisting Fifth Circuit precedent, he

found himself "constrained to obey the command of the heightened pleading requirement" in the Petitioners' case. Ibid.

The present Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The question of whether a "heightened pleading" requirement may properly be applied to complaints brought pursuant to 42 U.S.C. Section 1983 represents an important question which has not been, but should be, decided by the Supreme Court.

As Judge Goldberg has noted in his specially concurring opinion in the Court of Appeals, Pet. App. at page 24a n.3, 954 F.2d at 1061 n.3, it appeared that the Supreme Court would determine the validity of the "heightened pleading" requirement when it granted certiorari last Term in Siegart v. Gilley, 500 U.S. ___, 111 S.Ct. 1789 (1991). The Supreme

Court, however, did not reach the specific question in Siegart concerning the "heightened pleading" requirement, but affirmed the lower court decision on other grounds. While the Questions Presented in the present petition involve an application of the "heightened pleading" requirement in the context of local governmental liability under Section 1983, as opposed to the context in Siegart wherein an individual capacity defendant had asserted a qualified immunity defense, the validity of the Fifth Circuit's application of the heightened pleading requirement in the present case represents a question no less important than the "heightened pleading" question considered, but not decided, in Siegart v. Gilley. The extension of the heightened pleading requirement to local governmental

liability allegations under Section 1983 has led to sharp criticism in numerous law review articles, see Pet. App. at pages 16a-17a, 954 F.2d at 1059 (Goldberg, J., concurring) (listing articles), and, as Judge Goldberg observes in his special concurrence, its application "has generated great debate, resulting in what appears to be a Circuit split on the issue." Pet. App. at page 23a, 954 F.2d at 1061. The "circuit split" Judge Goldberg has noted represents a second reason why this petition should be granted, which Petitioners have set out below.

II. The Fifth Circuit's decision to apply a "heightened pleading" requirement to complaints alleging local governmental liability under 42 U.S.C. Section 1983 directly conflicts with the decisional law of the United States Court of Appeals for the Ninth Circuit, which has expressly rejected application of the "heightened pleading" requirement in the local governmental liability context.

The United States Court of Appeals for the Ninth Circuit has expressly refused to apply a "heightened pleading" requirement to Section 1983 complaints alleging local governmental liability. As Judge Goldberg notes, Pet. App. at page 18a, 954 F.2d at 1059 (concurring opinion), the Ninth Circuit has held that:

> "a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss 'even if the claim is based on nothing more than a bare allegation that the individual officer's conduct conformed to official policy, custom or practice.'"

Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 624 (9th Cir. 1988) [quoting Shah v. County of Los Angeles, 797 F.2d 743, 747 (9th Cir. 1986)]; accord, Evans v. McKay, 869 F.2d 1341, 1349 (9th Cir. 1989).

Absent en banc reconsideration of Shah v. County of Los Angeles, which does not appear likely, the holding quoted above will remain the decisional law of the Ninth Circuit. In the Ninth Circuit, "[a] panel not sitting en banc may not overturn Ninth Circuit precedent." Nichols v. McCormick, 929 F.2d 507, 510 n.5 (9th Cir. 1991).

The apparent "circuit split" between the Fifth and Ninth Circuits on the "heightened pleading" issue, noted by Judge Goldberg, Pet. App. at page 23a, 954 F.2d at 1061 (concurring opinion), also appears to involve the Seventh

Circuit. In Elliott v. Thomas, 937 F.2d 338, 345 (7th Cir. 1991), cert. denied sub. nom., Propst v. Weir, 502 U.S. ___, 112 S.Ct. 973 (U.S. Jan. 27, 1992) (No. 91-955), the Seventh Circuit "deprecated" the application of the heightened pleading requirement because, in that court's view, "it appear[ed] to conflict with rules 8, 9(b), and 56 of the Federal Rules of Civil Procedure." Pet.App. at pages 19a-20a, 954 F.2d at 1060 (concurring opinion).

Given the large number of actions filed in the Fifth Circuit under 42 U.S.C. Section 1983, and the apparent "circuit split" on the heightened pleading requirement issue, Pet. App. at page 23a, 954 F.2d at 1061 (concurring opinion), the circuit split in question constitutes an intolerable one which should be resolved by the Supreme Court.

III. The Fifth Circuit's decision to apply a "heightened pleading" requirement directly conflicts with the system of "notice" pleading mandated by Rule 8 of the Federal Rules of Civil Procedure and the Supreme Court's decision in Conley v. Gibson, 355 U.S. 41 (1957).

Dismissal of a complaint for failure to state a claim upon which relief can be granted, due to an alleged failure "to set forth specific facts," is governed by Rule 8 of the Federal Rules of Civil Procedure and the Supreme Court's decision in Conley v. Gibson, 355 U.S. 41 (1957). In Conley the respondents argued, like the Respondents in the instant case have successfully argued below, that the complaint they challenged "failed to set forth specific facts to support its general allegations." Id., 355 U.S. at 47. The Supreme Court rejected this challenge in Conley with the following holding:

> "[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' [quoting Rule 8(a)(2)] that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id., 355 U.S. at 47.

The Fifth Circuit's decision to apply a "heightened pleading" requirement to this and other similar cases directly conflicts with the system of "notice" pleading. The Fifth Circuit, like all other Courts of Appeals, is obliged to "give the Federal Rules of Civil Procedure their plain meaning," Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 123 (1989), and "to apply the text, not to improve upon it." Id., 493 U.S. at 126.

The Reporter of the Supreme Court's Committee on the Rules of Civil Procedure which drafted Rule 8, later sitting as an

appellate judge, has confirmed in a decision cited favorably by the Supreme Court in Conley v. Gibson, 335 U.S. at 46 n.5, that "there is no pleading requirement [under the Federal Rules of Civil Procedure] of 'stating facts sufficient to constitute a cause of action.'" Dioguardi v. Durning, 139 F.2d 774, 775 (2nd Cir. 1944) (Opinion per Charles E. Clark, J.). The Fifth Circuit's ill-advised, deliberate and systemic departure from the principle of "notice" pleading adopted by the Federal Rules of Civil Procedure and affirmed by the Supreme Court in Conley v. Gibson, warrants corrective action by the Supreme Court without further delay.

IV. The Fifth Circuit's decision to apply a "heightened pleading" requirement directly conflicts with the Rules Enabling Act, 28 U.S.C. Section 2072(b), which provides that rules of practice and procedure "shall not abridge, enlarge or modify any substantive right."

The Supreme Court has never approved, through the procedures mandated by the Rules Enabling Act, 28 U.S.C. Section 2072 (or otherwise), the sort of departure from "notice" pleading which is entailed in the Fifth Circuit's selective application of a "heightened pleading" requirement solely to civil rights cases brought under 42 U.S.C. Section 1983. Even had the Supreme Court approved such a departure, adoption of a "heightened pleading" requirement to authorize dismissal of a complaint prior to discovery would directly violate 28 U.S.C. Section 2072(b), which prohibits adoption of rules of practice and

procedure which "abridge, enlarge, or modify any substantive right."

The Fifth Circuit has candidly acknowledged that its application of the "heightened pleading" requirement results in the dismissal "of some meritorious claims." Streetman v. Jordon, 918 F.2d 555, 557 n.2 (5th Cir. 1990). When extended to apply to the local governmental entity context, the "heightened pleading" requirement impermissibly, and intolerably, "add[s] requirements to burden the private litigant beyond what is specifically set forth by Congress." Radovich v. National Football League, 352 U.S. 445, 454 (1957) (rejecting "technical objections" to Sherman Act complaint).

CONCLUSION

For the foregoing reasons, Petitioners

pray that a Writ of Certiorari issue to review the February 28, 1992 Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Charlene LEATHERMAN, et al.,
Plaintiffs-Appellants,

V.

TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT, et al.,
Defendants-Appellees

No. 91-1215

United States Court of Appeals,
Fifth Circuit.

Feb. 28, 1992

Appeal from the United States District Court for the Northern District of Texas.

Before GOLDBERG, SMITH, and DUHE, Circuit Judges.

GOLDBERG, Circuit Judge:

After police shot and killed their two dogs during the execution of a search warrant, plaintiffs brought this 1983 action against the municipal defendants employing the police officers involved. They alleged that the municipalities had failed to adequately train their officers, and that such failure amounted to a municipal policy. The district court, 755 F. Supp. 726 (N.D.Tex.1991), dismissed the complaint because it did not satisfy this circuit's "heightened pleading requirement." Under the heightened pleading standard, a complaint must allege with particularity all material facts establishing a plaintiff's right of recovery, including "detailed facts supporting the contention that [a] plea of immunity cannot be sustained," *Elliott v. Perez,* 751 F.2d 1472, 1482 (5th Cir.1985), and, in cases like this one, facts that support the requisite allegation that the municipality engaged in a policy or custom for which it can be held responsible. *Palmer v. City of San Antonio,* 810 F2d 514, 517 (5th Cir.1987). Because plaintiffs complaint does not satisfy the heightened pleading requirement, we affirm.

Dog Day Afternoon

This civil rights case arose out of two separate incidents involving the execution of search warrants by law enforcement officers with the Tarrant County Narcotics Intelligence and Coordination Unit. One incident involved Charlene Leatherman, her son Travis, and her two dogs, Shakespeare and Ninja. Ms. Leatherman and Travis were driving in Fort Worth when they were suddenly stopped by police cars. Police officers surrounded the two of them, shouting instructions and threatening to shoot them. The officers informed Ms. Leatherman that other law enforcement officers were in the process of searching her residence. The officers also informed her that the search team had shot and killed their two dogs. Ms. Leatherman and Travis returned to their home to find Shakespeare lying dead some twenty-five feet from the front door. He had been shot three times, once in the stomach, once in the leg, and once in the head. Ninja was lying in a pool of blood on the bed in the master bedroom. He had been shot in the head at

close range, evidently with a shotgun, and brain matter was splattered across the bed, against the wall, and on the floor around the bed. The officers found nothing in the home relevant to their investigation. Rather than departing with dispatch, they proceeded to lounge on the front lawn of the Leatherman home for over on hour, drinking, smoking, talking, and laughing, apparently celebrating their seemingly unbridled power.

The other incident alleged in plaintiff's amended complaint involved a police raid of the home of Gerald Andert pursuant to a search warrant. The warrant was issued on the basis that police officers had smelled odors associated with the manufacture of amphetamines emanating from the Andert home. At the time of the raid, Andert, a sixty-four year old grandfather, was at home with his family mourning the death of his wife; she had died after a three year battle with cancer. Without knocking or identifying themselves, the officers burst into the home and, without provocation, began beating Andert. First, an unidentified officer knocked him

backwards. When Andert turned, he was greeted by two swift blows to the head inflicted by a club, presumably of the billy-style. His head wound would require eleven stitches. Other officers, in the meantime, shouted obscenities at the family members, who were still unaware of the intruders' identities. At gunpoint, the officers forced the family members to lie face down on the floor. The officers did not relent: they continued to insult the residents and threatened to harm them. After searching the residence for one and one-half hours and finding nothing in the residence related to narcotics activity, the officers finally left.

Plaintiffs sued the Tarrant County Narcotics Intelligence and Coordination Unit ("TCNICU"), Tim Curry (in his official capacity as director of that unit), Tarrant County, Don Carpenter (sheriff of Tarrant County), the City of Lake Worth, Texas, and the City of Grapevine, Texas, in connection with these two incidents. Their amended complaint [1]

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[1]Plaintiffs' original complaint only referenced the incident involving the Leathermans and their two dogs. Plaintiffs amended their complaint to include the Andert incident and

alleged generally that the municipalities failed to formulate and implement an adequate policy to train its officers on the proper manner to execute search warrants and respond when confronted by family dogs. The allegations were of the "boilerplate" variety, alleging no underlying facts other than the events described above to support the assertions that the municipalities had adopted policies, customs, and practices condoning the conduct of the officers involved.[2] The complaint did not name any of the officers in their individual

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add the City of Grapevine and City of Lake Worth as defendants.

[2]The amended complaint did allege that one of the officers, in response to Ms. Leatherman's inquiry as to why the officers had shot the dogs, responded that it was "standard procedure." At most, that admission by the officer establishes that the municipalities had adopted a standard procedure for neutralizing dogs encountered during the execution of a search warrant. It does not establish that the municipalities had a policy of killing all dogs during a search, or that the municipalities failed to adequately train officers in appropriately responding to animals encountered during a search. In other words, the admission only suggests the existence of a municipal policy; it does not convey the policy's content. We also note that the allegation concerning the admission was not substantiated in Ms. Leatherman's affidavit tendered in opposition to defendants' motion.

capacities as defendants.[3] TCNICU, Tim Curry, and Don Carpenter moved the district court to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6), or in the alternative, to enter summary judgment in their favor pursuant to Fed. R. Civ.P. 56. They argued first that the complaint did not adequately allege facts under this circuit's heightened pleading standard establishing that the municipality adopted a policy or custom countenancing the police conduct or that its failure to train amounted to deliberate indifference to the rights of the plaintiffs. Alternatively, the movants sought summary judgment, arguing that the evidence would fall short of establishing the necessary elements of municipal liability.

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[3]The complaint also alleged that the municipalities engaged in a custom and practice of preparing and causing the issuance of search warrants for residences based solely on the detection of odors associated with illegal drug manufacturing. The district court held that such a practice does not amount to a constitutional violation. See Johnson v. United States, 333 U.S. 10, 13, 68 S.Ct. 367, 368-69, 92 L.Ed. 436 (1948); United States v. McKeever, 906 F.2d 129, 132 (5th Cir.1990), cert.denied, ___U.S.___, 111 S. Ct. 790, 112 L.Ed.2d 852 (1991).

The district court granted the motion and dismissed all of plaintiffs' claims against all of the defendants, movants and nonmovants alike. The district court held that the complaint did not satisfy the heightened pleading standard, and that in any event, the evidence in the record demonstrated that all defendants were entitled to summary judgment as a matter of law. On appeal, plaintiffs urge this court to abandon the heightened pleading requirement, apparently conceding that their complaint does not satisfy that standard. Putting aside any pleading deficiencies, they also challenge the propriety of summary judgment. Finally, they contend that the district court's *sua sponte* dismissal of their claims against the nonmovants, defendants City of Grapevine and City of Lake Worth, was premature because the district court did not provide them with notice that it was contemplating dismissing their claims against those nonmoving defendants.

All Bark, No Bite

In *Elliott v. Perez,* 751 F2d 1472 (5th Cir.1985), this circuit adopted the heightened pleading requirement for cases against state actors in their individual capacities. Reasoning that the doctrine of immunity should accord the defendant-official not only immunity from liability, but also immunity from defending against the lawsuit, *id.* at 1477-78 (citing *Harlow v. Fitzgerald, 457* U.S. 800, 816-17, 102 S.Ct 2727, 2737-38, 73 L.Ed.2d 396 (1982), the *Elliott* court held that:

> In cases against government officials involving the likely defense of qualified immunity we require of trial judges that they demand that the plaintiff's complaint state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity.

Id. at 1473

Since *Elliott,* this circuit has, without fail, applied the heightened pleading requirement in cases in which the defendant-official can raise the immunity

defense. *E.g., Jacquez v. Procunier,* 801 F.2d 789, 791-92 (5th Cir.1986); *Geter v. Fortenberry,* 849 F.2d 1550, 1553-54 (5th Cir.1988); *Streetman v. Jordan,* 918 F.2d 555, 557 (5th Cir.1990); *Vinson v. Heckmann,* 940 F.2d 114, 116 (5th Cir.1991); *Husband v. Bryan,* 946 F.2d 27, 30 (5th Cir.1991). We have written that "pleadings, replete with ...conclusory statements, do not defeat the officers' qualified immunity defense." *Streetman,* 918 F.2d at 557. Other circuits have similarly applied the heightened pleading requirement. For a collection of cases, see Schwartz and Kirklin, *Section 1983 Litigation: Claims, Defenses and Fees,* Vol. I, sec. 1.6 n. 106 (1991).

In *Palmer v. City of San Antonio,* 810 F.2d 514, 516-17 (5th Cir.1987), a panel of this court extended the heightened pleading requirement into the municipal liability context. The court assumed, *sub silentio,* that the heightened pleading requirement logically applied not only in cases against defendant-officials, but in all section 1983 cases, including cases brought against a

municipality. The *Palmer* court did not explain why the heightened pleading requirement should be extended to defendant-municipalities, considering that municipalities cannot claim the immunity defense. *See Owen v. City of Independence, Mo.,* 445 U.S.622, 650, 100 S.Ct. 1398, 1415, 63 L.Ed.2d 673 (1980) (rejecting "a construction of section 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violation"). A later panel of this court suggested that:

> [i]n view of the enormous expense involved today in litigation, ... the heavy cost of responding to even a baseless legal action, and of Rule 11's new language requiring reasonable inquiry into the facts of the case by an attorney *before* he brings an action, applying the stated rule to all section 1983 actions has much to recommend it.

Rodriguez v. Avita, 871 F.2d 552, 554 (5th Cir.1989), *cert denied,* 493 U.S. 854, 110 S.Ct. 156, 107 L.Ed.2d

114 (1989). [4] Thus, under *Elliott* and *Palmer*, the heightened pleading requirement governs all section 1983 complaints brought in this circuit: If the complaint is all bark and no bite, a district court is constrained to dismiss it even before opening discovery.

With the heightened pleading requirement as our guide, we turn to the particulars of this case. Quite plainly, plaintiffs' complaint falls short of alleging the requisite facts to establish a policy of inadequate training. Where, as here, a lawsuit brought against a municipality is predicated on inadequate training of its police officers, *see generally City of Canton, Ohio v. Harris,* 489 U.S. 378, 109 S.Ct.1197, 1205-06, 103 L.Ed.2d 412 (1989), this circuit has cautioned that "to make such a showing in such a case, there would have to be demonstrated 'at least a pattern of similar incidents

[4]The Rodriguez court indicated that it had no need in that case to "go so far" as extending the heightened pleading requirement in the municipal liability context. Id. Apparently, the Rodriguez panel was unaware that the Palmer panel had already gone that far.

in which the citizens were injured' ...[in order] to establish the official policy requisite to municipal liability under section 1983." *Rodriguez,* 871 F.2d at 554-55 (citing *Languirand v. Hayden,* 717 F.2d 220, 227 (5th Cir.1983), *cert, denied,* 467 U.S. 1215, 104 S.Ct. 2656, 81 L.Ed.2d 363 (1984)); *see also City of Oklahoma City v. Tuttle,* 471 U.S. 808, 823-24,105 S.Ct. 2427, 2436-37, 85 L.Ed.2d 791 (1985) ("Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell,* unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy..."). While plaintiffs' complaint sets forth the facts concerning the police misconduct in great detail, it fails to state any facts with respect to the adequacy (or inadequacy) of the police training.

Although we are troubled by the absence of notice preceding the district court's *sua sponte* dismissal of the claims against the nonmovants,[5]

[5]Plaintiffs did know that the court was evaluating the adequacy of their complaint, if not the entire complaint, at

defendant City of Grapevine and City of Lake Worth, we nevertheless affirm the dismissal of those claims as well. Plaintiffs do not contend in this court that they are prepared to allege specific facts in an amended complaint so as to render it in compliance with our heightened pleading requirement. We conclude, therefore, that the district court's failure to notify plaintiffs of its intention to dismiss the claims against the nonmovants, in the context of this case, was harmless. *C.f. Powell v. United States,* 849 F.2d 1576, 1580-82 (5th Cir.1988) (applying harmless error test to the notice requirement under Federal Rule of Civil Procedure 56 [summary judgment]).[6]

The judgment of the district court is AFFIRMED.

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least that portion pertaining to the claims against the moving defendants.

[6]The district court ruled, in the alternative, that summary judgment was appropriate and that no further discovery was necessary. Because we hold that the district court properly dismissed the complaints based on the insufficiency of the allegations, we need not reach the other issues raised.

GOLDBERG, Circuit Judge, concurring specially.

Plaintiffs make no bones about it. Nowhere do they contend that their complaint satisfies the heightened pleading requirement. Instead, they urge this panel to abandon the requirement in favor of the traditional notice pleading standard set forth in *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 102-03, 2 L.Ed.2d 80 (1957). I write further to articulate and comment upon their position.

These Dogs Want Their Day

Plaintiffs argue that the heightened pleading requirement finds no support in the Federal Rules of Civil Procedure or in Supreme Court precedent.[1]

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[1]At least one member of the Supreme Court, Justice Kennedy, has expressed approval of the heightened pleading requirement in the immunity context, though he believes that the plaintiff needs to make specific factual allegations only after the defendant has raised the qualified immunity defense.

> The heightened pleading standard is a departure from the usual pleading requirement of Federal Rules of Civil Procedure 8 and 9(b), and departs also from the normal standard for summary judgment under Rule 56. But avoidance of disruptive

They direct our attention to a plethora of articles and essays by persuasive commentators who champion this view. *See, e.g.,* Schwartz and Kirklin, *Section 1983 Litigation: Claims, Defense and Fees,* Vol.I, sec. 1.6, at p. 20 (1991) ("[t]here are pragmatic and theoretical difficulties with the heightened pleading requirement"); Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirement in Civil Rights Litigation,* 31 Wm. & Mary L.Rev. 935, 949 (1990) (arguing that the creation of the heightened pleading requirement has no "direct legal support"); Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure,* 74 Cornell L.Rev. 270, 299 (1989)

> discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.
>
> Upon the assertion of a qualified immunity defense the plaintiff must put forward specific nonconclusory factual allegations ... or face dismissal.

Siegert v. Gilley, ___U.S.___, 111 S.Ct. 1789, 1795, 114 L.Ed.2d 277 (1991) (Kennedy, J., concurring).

("[f]ederal courts may lack the requisite authority to demand more stringent pleading" in civil rights cases); Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions,* 23 Ga. L.Rev. 597, 657 n. 235 (1989) ("[i]t is not obvious that the courts have authority to impose [the heightened pleading] requirement"); Saalman, *Rule 11 in the Constitutional Case,* 63 Notre Dame L.Rev. 788, 808-09 (1988) ("neither the Federal Rules nor the holdings of the Supreme Court interpreting those Rules provide for such a disparity of treatment" between section 1983 cases and all other lawsuits); Wingate, *A Special Pleading Rule for Civil rights Complaints: A Step Forward or a Set Back?,* 49 Mo.L.Rev. 677, 683 (1984) (arguing that there is no "direct authority for the [heightened pleading] rule"); Roberts, *Fact Pleading, Notice Pleading, and Standing,* 65 Cornell L.Rev. 390, 418 n.175 (1980) (asserting that "[t]he Supreme Court has never approved such an exception to federal notice pleading").

Plaintiffs also observe that some circuits have

declined to embrace the heightened pleading requirement. The Ninth Circuit, for example, has held that the heightened pleading requirement applies neither in the defendant-official context, *Bergquist v. County of Cochise,* 806 F.2d 1364, 1367, (9th Cir.1986), nor in the municipal liability arena. *Karim-Panahi v. Los Angeles Police Dept.,* 839 F.2d 621, 624 (9th Cir.1988). That court has stated squarely that our decision in *Elliott v. Perez* "is not the law in this circuit," *Bergquist,* 806 F.2d at 1367, and that "a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss 'even if the claim is based on nothing more than a bare allegation that the individual officer's conduct conformed to official policy, custom, or practice.'" *Karim-Panahi,* 839 F.2d at 624 (quoting *Shah v. County of Los Angeles,* 797 F.2d 743, 747 (9th Cir.1986). In *Branch v. Tunnell,* however, a later panel of the Ninth Circuit "adopt[ed] a heightened pleading standard in cases in which subjective intent is an element of a constitutional

tort action." 937 F.2d 1382, 1386 (9th Cir.1991).[2]

The Seventh Circuit has expressed skepticism of the heightened pleading requirement as well. Echoing the concerns voiced by our Judge Higginbotham in his specially concurring opinion in *Elliott v. Perez,* 751 F.2d at 1482-83, the Seventh Circuit "deprecate[d] the expression 'heightened pleading requirement'" because, in the court's view, it appears to conflict with rules 8, 9(b), and 56 of the Federal Rules of Civil Procedure. Judge Easterbrook, writing for the court, explained:

> It is better, we think, to recognize that official immunity is an affirmative defense, which need be asserted only after a plaintiff gets past the (slight) hurdles established by Rule 8 and 9(b). A possibility that the defendants will claim immunity does not require the

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[2]The Branch court did not endeavor to reconcile its holding with the earlier Ninth Circuit decision in Bergquist. It relied primarily on the District of Columbia Circuit's decision in Siegert v. Gilley, 895 F.2d 797, 802 (D.C.Cir.1990), affirmed on other grounds, ___U.S. ___, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991), and Justice Kennedy's concurring opinion affirming the District of Columbia Circuit's decision. 111 S.Ct. at 1795 (Kennedy, J., concurring).

> plaintiff to anticipate and pled around that defense. *Gomez v. Toledo,* 446 U.S. 625 (1980). Defendants assert immunity by pleading it in the answer and moving for summary judgment [under Rule 56].

Elliott v. Thomas, 937 F.2d 338, 345 (7th Cir.1991), *cert. denied,* ___U.S.___, ___S.Ct. ___, __ L.Ed.2d ___, 1991 WL 277210 (Jan. 27, 1992).

Plaintiffs also contend that even if the heightened pleading requirement makes sense in the context of cases like *Elliott v. Perez,* which involve the likely defense of immunity, the extension of the heightened pleading requirement to complaints against municipalities, as in this case, is unwarranted. The rationale underlying the heightened pleading requirement----providing defendant-officials with immunity from defending a lawsuit----carries no force in the municipality context because defendant-municipalities, unlike defendant-officials, cannot claim an immunity defense. *Owen v. City of Independence, Mo.,* 445 U.S. 622, 650, 100 S.Ct. 1398, 1415, 63 L.Ed.2d 673

(1980). To the extent that the heightened pleading requirement is on tenuous soil when immunity is available, *Elliott v. Perez,* 751 F.2d at 1483 (Higginbotham, J., concurring), plaintiffs contend that even less reason exists to fashion an exception to the notice pleading requirement when the defendant enjoys no immunity at all. Municipalities, plaintiffs argue, should not be afforded the benefit of a heightened pleading requirement; like any other defendant in any other case, municipalities should defend an action if the complaint satisfies the traditional, more lenient, notice pleading requirements set forth in *Conley v. Gibson.*

There is something to be said for this argument. The rationale given by the *Rodriguez* court for extending the heightened pleading requirement into the municipal liability arena----the expense of litigation and Rule 11's demand for reasonable inquiry into the facts before bringing an action----is not unique to the section 1983 domain. After all, every lawsuit, not just section 1983 cases, represents

a potentially expensive proposition for the defendant, and Rule 11 governs every civil case, no matter what the subject matter of the suit. By adopting notice pleading and not fact pleading, Congress has struck the balance in favor of plaintiffs: "[N]otice pleading concepts rest on acceptance of the idea that one may sue now and discover later...." *Elliott v. Perez,* 751 F.2d at 1482-83 (Higginbotham, J., concurring). Unless this court----or Congress, rather----intends to abandon notice pleading altogether, it is difficult to justify singling out section 1983 municipality cases over *all* other cases for application of the heightened pleading requirement. This is especially true in light of the challenges encountered when attempting to establish municipal liability. Plaintiffs must affirmatively prove a policy of inadequate training, yet the heightened pleading requirement forecloses any discovery which might uncover the evidence supporting their general allegation. Of course, we might expect that the municipality would have exclusive access to the information necessary

to prove a policy, such as statistics, internal policy manuals, confidential memoranda and the like. As one source observes, the heightened pleading requirement "places an unrealistic burden on civil rights claimants who might have legitimate claims against municipalities, yet are foreclosed by the specific fact-pleading rule from obtaining the necessary information from the municipality through discovery." Schwartz and Kirklin, *supra* Vol. I, sec. 7.12, at p. 393.

Let Sleeping Dogs Lie

The heightened pleading requirement has its proponents and its critics. Its application to section 1983 suits has generat eat debate, resulting in what appears to be a circuit split on the issue. Although I have taken the time to lay out the competing arguments and am impressed by the wealth of authority plaintiffs cite in support of their position, I agree that we, as a panel of this court, must politely decline their invitation to reexamine the wisdom of this circuit's heightened pleading requirement. Until such a time as the en banc

court sees fit to reconsider *Elliott* or, more specifically, *Palmer,* and in the absence of an intervening Supreme Court decision undermining our settled precedent,[3] I find myself constrained to obey the command of the heightened pleading requirement.[4]

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[3]It appeared that the Supreme Court would resolve the dispute when it granted certiorari in Siegert v. Gilley, ___U.S.___, 111 S. Ct. 1789, 114 L.Ed.2d 277 (1991), but the Court did not reach the question. See id. 111 S.Ct. at 1795 (Kennedy, J., concurring) (indicating that he would have preferred that the Court resolve the issue).

[4]See Pruitt v. Levi Strauss & Co., 932 F.2d 458, 465 (5th Cir,1991) ("In this circuit one panel may not overrule the decision, right or wrong, of a prior panel, in the absence of en banc consideration or superseding decision of the Supreme Court.") (citations and quotations omitted).

Charlene LEATHERMAN, Kenneth Leatherman, as Individuals and Next Friends of Travis Leatherman; Gerald Andert, Kevin Lealos, Jerri Lealos, as Individuals and Next Friends of Shane Lealos; Travor Lealos, Pat Lealos, Donald Andert, Lucy Andert, Plaintiffs,

v.

TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT, Tarrant County, Texas, Tim Curry, in His Official Capacity as Director of Tarrant County Narcotics and Coordination Unit, Don Carpenter, City of Lake Worth, Texas, City of Grapevine, Texas, Defendants.

Civ. A. No. 4-89-842-A

United States District Court,
N.D. Texas
Fort Worth Division.

Jan. 22, 1991.

MEMORANDUM OPINION
AND ORDER

McBRYDE, District Judge.

Came on to be considered (1) the motions of defendants The Tarrant County Narcotics Intelligence and Coordination Unit ("TCNICU"); Tim Curry ("Curry"), in his official capacity as Director of TCNICU; Tarrant County, Texas ("Tarrant"); and Don Carpenter ("Carpenter"), in his official capacity as Sheriff of Tarrant, to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) and for summary judgment pursuant to Fed.R.Civ.P. 56, and (2) the motion of defendant City of Grapevine, Texas ("Grapevine") to dismiss pursuant to Rule 12(b)(6). The court has determined that the dismissals sought by such motions should be granted and that the claims against the remaining defendant, City of Lake Worth, Texas, ("Lake Worth") should also be dismissed.

Nature and History of the Litigation

This sec. 1983[1] action was removed to this court from a state district court. When removed, it was an action by Charlene Leatherman and Kenneth Leatherman, as individuals and next friends of

[1] 42 U.S.C. sec. 1983.

Travis Leatherman, as plaintiffs (the "Leatherman plaintiffs"), against TCNICU and Tarrant, as defendants.

Shortly after the removal occurred, TCNICU and Tarrant filed a motion to dismiss pursuant to Rule 12(b)(6) and a motion for summary judgment pursuant to Rule 56. The court, acting through Judge David O. Belew, Jr., granted the requested dismissal by order signed February 1, 1990. Plaintiffs moved to vacate the dismissal, which the court, acting through Judge Belew, did by order signed March 8, 1990. The order vacating the dismissal directed the Leatherman plaintiffs to amend their complaint within twenty (20) days. Their amended complaint was filed March 23, 1990. Not only did it restate the claims of the Leatherman plaintiffs, but it added new plaintiffs, who asserted causes of action based on a set of facts that was separate and distinct from the set of facts upon which the Leatherman Plaintiffs were

basing their claims and a new group of defendants.[2] The added plaintiffs were Gerald Andert, Donald Andert, Lucy Andert, Pat Lealos and Kevin and Jerri Lealos, individually and in their capacities as next friends of Shane and Travor Lealos, minors (the "Andert/Lealos plaintiffs"); and, the newly named defendants were Curry, in his official capacity, Carpenter, in his official capacity, Grapevine and Lake Worth.

The motions that are now before the court were filed in response to the allegations of the amended complaint. Lake Worth has answered, but has not moved for dismissal.

The claims of the Leatherman plaintiffs are predicated on things that happened at the time of a putative drug raid on the Leatherman home. Allegations of the amended complaint assert as to the Leathermans that: (1) in May 1989 the Leatherman home was entered and searched by law

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[2] There is a question as to the authority of plaintiffs to add the new parties and causes of action, but, in view of the grant of dismissals, the court does not need to resolve that matter.

enforcement officers employed by and under the control of TCNICU, Tarrant and Lake Worth; (2) during the course of the search two dogs belonging to the Leathermans were shot to death; (3) the officers threatened to shoot two of the Leathermans; (4) after the officers realized that none of the items described in the warrant pursuant to which they entered the Leatherman home were present, the officers frolicked in the driveway and yard of the residence; and (5) the conduct of the law enforcement officers deprived the Leathermans of rights they have under the fourth and fourteenth amendments of the United States Constitution.

An earlier, unrelated, putative drug raid gave rise to the claims of the Andert/Lealos plaintiffs. The allegations in reference to those plaintiffs are that: (1) in January 1989 law enforcement officers of Grapevine and TCNICU broke into the Lealos home under authority of a search warrant; (2) one of the officers clubbed Gerald Andert in the head; (3) the officers held the Andert and Lealos family members at gunpoint, causing them to fear for their

lives, and forced them to lie face down on the floor, and, in the course of doing so, the officers shouted obscenities and threats at family members who made requests for identification of the intruders; (4) after having discovered from a search of the Lealos residence no items that could form the basis of criminal prosecution, the officers left the premises without an apology; and (5) the conduct of the law enforcement officers deprived the Andert/Lealos plaintiffs of their fourth and fourteenth amendment rights.

None of the law enforcement officers who participated in the activities described in the amended complaint are named as defendants. The sole defendants are TCNICU, Tarrant, Curry, in his official capacity, Carpenter, in his official capacity, Grapevine, and Lake Worth.

Allegations Directed Against Curry and Carpenter:

No allegations against Curry or Carpenter in a non-official capacity.

The allegations against Curry are that, at pertinent times, he, as director of TCNICU, was

vested with official authority and responsibility for establishing policies for and supervising the day-to-day operations and practices of law enforcement personnel participating in and compromising [sic] TCNICU; that TCNICU acted by and through "its official policymaker", Curry, in respect to policies and practices of TCNICU having to do with training of its officers; and, that a custom and policy of TCNICU of which plaintiffs complain was so persistent and widespread that Curry, as the official policymaker of TCNICU, either knew or should have known of its existence.

The allegations against Carpenter are virtually identical to those against Curry except that the complaint against Carpenter is in his capacity as Sheriff of Tarrant, and the allegations against him are in reference to the conduct of Tarrant and are based on his alleged capacity as the "official policymaker" of Tarrant.

No recovery is sought by plaintiffs from Curry or Carpenter.

The Theories of Recovery Alleged Against the

Public Entity Defendants:

After alleging acts of allegedly wrongful conduct on the part of the law enforcement officers who engaged in the raids of which plaintiffs complain, plaintiffs seek to impose responsibility on the public entities by boilerplate, conclusionary allegations pertaining, first, as to all public entity defendants, to adequacy of training of the law enforcement officers and, second, as to TCNICU, to an alleged custom and practice to prepare affidavits and cause the issuance and execution of search warrants predicated on no more than the detection of odors associated with illegal drug manufacturing.

The Threshold Reason why Dismissal Should be made as to Curry and Carpenter

In *Brandon v. Holt,* 469 U.S. 464, 105 S.Ct 873, 83 L.Ed.2d 878 (1985), the Supreme Court made clear that an action brought under sec. 1983 against a police officer in his official in his official capacity is tantamount to an action against the public entity for which the official is alleged to act. Individual liability of the official cannot flow from a suit

against him in his official capacity. A judgment against him in that capacity is the same as a judgment against the public entity he represents, assuming that the public entity has received notice and an opportunity to respond. *Brandon,* 469 U.S. at 471-72, 105 S.Ct. at 877-78.

Inasmuch as Curry and Carpenter are sued only in their respective official capacities, and the respective entities they are alleged to represent are joined as party defendants, there is no reason why Curry or Carpenter should continue to be defendants in this action. The court is ordering their dismissal. There appear to be other reasons why Curry and Carpenter should be dismissed from the suit, but the court does not need to go beyond this threshold reason.

The Inspirations for Plaintiffs' "Inadequate Training" and "Custom and Practice" Allegations

The inadequate training allegations are inspired by the holding of the Supreme Court in *City of Canton v. Harris,* 489 U.S. 378, 109 S.Ct 1197, 103 L.Ed.2d 412 (1989). Plaintiffs allege, in a

conclusionary way, the elements of a sec. 1983 inadequate training cause of action, as defined in *City of Canton,* against each of the public entity defendants.

Plaintiffs' "custom and practice" allegations related to the obtaining of search warrants on the basis of nothing more than detection of odors associated with illegal drug manufacturing have their genesis in the Supreme Court's *Monell v. New York City Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), opinion. Again, plaintiffs have used in a conclusionary way the words that speak the cause of action defined by the Supreme Court.

Particularity Required in a Pleading that Purports to Assert a sec. 1983 Action Against a Public Entity

The Fifth Circuit repeatedly has held that district courts should hold plaintiffs in sec. 1983 actions such as this to a high degree of particularity in their pleadings. *See Rodriguez v. Avita,* 871 F.2d 522 (5th Cir.1989); *Palmer v. City of San Antonio, Texas,* 810 F.2d 514 (5th Cir.1987); *Elliott v. Perez,* 751 F.2d

1472 (5th Cir.1985); and *Morrison v. City of Baton Rouge,* 761 F2d 242 (5th Cir.1985). *Elliott* explained the policy reason why "blunderbuss phrasing of the arguable claims in the plaintiffs' complaints" will not suffice, and noted that a lack of pleading particularity "eviscerates important functions and protections of official immunity." 751 F.2d at 1476. In *Elliott,* the Fifth Circuit stated that:

> In the now familiar cases involving 42 U.S.C. sec. 1983 we consistently require the claimant to state specific facts, not merely conclusory allegations.

Id. at 1479.

While *Elliott* dealt with an action against public officials, its principles apply with equal force to an action against a public entity. *Palmer* was such an action. Apropos to the instant case, the Fifth Circuit said in *Palmer:*

> Similarly, an isolated incident is not sufficient to show that a custom exists. As we stated in *Bennett v. City of Slidell,* 728 F.2d 762, 768 n. 3 (5th Cir.1984)(en banc), *cert. denied,* 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d

612 (1985): "Isolated violations are not the persistent often repeated, constant violations that constitute custom and policy."

....

We have also consistently required a section 1983 plaintiff to state specific facts and not merely conclusory allegations. *Elliott v. Perez,* 751 F.2d 1472, 1479 & n. 20 (5th Cir.1985) (citing cases). While it might be possible that a basis for municipal liability exists in this case, Palmer states no facts in his complaint to support his assertion that San Antonio authorized and approved the practice of its police officers using excessive force when making arrests or that such a well settled practice of doing so existed. Although Palmer has already amended his complaint once, the complaint still fails to meet the requirements of *Elliott.* As we have made clear, the assertion of a single incident is not sufficient to show that a policy or custom exists on the part of a municipality. *Slidell,* 728 F.2d at 768 n. 3. Palmer failed to allege that there are prior incidents which, if taken as true, would reveal the existence of an unconstitutional custom on the part of San Antonio. Accordingly, we affirm the district Court's order of dismissal

with respect to the city of San Antonio.

810 F.2d at 516-17.

Rodriguez made clear that boilerplate, conclusionary allegations combined with a description of a single incident will not suffice. When speaking in reference to a pleading that was no more generally worded than the one involved in this action, the court had the following to say:

> Such a pleading does no more than describe a single incident of arguably excessive force applied by one officer--a description decked out with general claims of inadequate training and gross negligence, all concededly stemming from the single incident and nowhere else. It is clear from counsel's quoted colloquy with the trial judge that he has pled his case fully and has nothing to add, that the sole foundation for his general and conclusory allegations of "gross negligence" and "grossly inadequate training" was the pleaded incident itself. Under the rules of *Tuttle* and *Languirand [v. Hayden,* 717 F.2d 220 (5th Cir.1983)] discussed above, there is no case---not as a matter of pleading, merely, but as one

of conceded fact.

871 F.2d at 555.

Plaintiffs' Pleadings do Not Contain the Required Particularization

Though plaintiffs were afforded an opportunity to amend in response to an earlier Rule 12(b)(6) motion to dismiss, and did file such an amendment, plaintiffs' allegations of their theories of municipal entity liability are blunderbuss in character and describe only isolated incidents "decked out with general claims of inadequate training ...." and the like. *Rodriguez,* 871 F.2d at 555.

The inadequate training allegations of the Leatherman plaintiffs is limited, as to each defendant, to (a) claims of failure to formulate and implement an adequate policy to train its officers on the proper manner in which to respond when confronted by family dogs when executing search warrants, and (b) the impermissibly broad allegations that there was a failure "to formulate and implement an adequate policy to train its

officers on the Constitutional limitations restricting the manner in which search warrants may be executed." There is no mention in the complaint of more than one incident of confrontation by officers of a defendant with family dogs. All inadequate training allegations of the Andert/Lealos plaintiffs are boilerplate claims of the "failed to formulate and implement an adequate policy to train its officers on the Constitutional limitations restricting the manner in which search warrants may be executed" variety. The complaint does not suggest the kind of training that plaintiffs contend should have been, but was not, given; nor, is there any specificity or particularity as to other elements of the inadequate training theory.

Moreover, neither the descriptions contained in the complaint of the searches made of the two residences in question nor related allegations provide in the least the particularization that would be necessary to state factually a deliberate indifference to the Constitutional rights of persons likely to be affected by a failure to train or a failure

to formulate and implement an adequate policy to train.

The shortcomings of the allegations of the complaint on the "training" theories, standing alone, provide reason for dismissal of all plaintiffs' claims based on those theories.

The same can be said of the generally stated allegations asserting the theory that TCNICU should be held liable because of an alleged custom and practice of TCNICU and its law enforcement personnel to prepare affidavits and cause the issuance and execution of search warrants predicated on no more than the detection of odors associated with illegal drug manufacturing. No facts are pleaded that would satisfy the multiplicity of incident requirement. Clearly, the pleading does not present a case of custom and practice under the standards of particularization adopted by the Fifth Circuit. The court turns now to another reason why the pleading must fail as to the "odor" theory.

The Issuance of the Search Warrant Predicated on no More than the Detection of an Odor Associated with Illegal Drug Manufacturing or Trafficking is an Acceptable Practice

In *Johnson v. United States,* 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed 436 (1948), law enforcement officers entered and searched defendant's hotel room after they recognized coming from her room a strong odor of burning opium. Incriminating opium and smoking apparatus were found. The Supreme Court held that the search was improper, but in the course of doing so explained:

> At the time entry was demanded the officers were possessed of evidence which a magistrate might have found to be probable cause for issuing a search warrant. We cannot sustain defendant's contention, erroneously made, on the strength of *Taylor v. United States,* 286 U.S. 1 [52 S.Ct. 466, 76 L.Ed. 951 (1932)], that odors cannot be evidence sufficient to constitute probable grounds for any search. That decision held only that odors alone do not authorize a search without warrant. If the presence of odors is testified to before a magistrate and he finds the affiant

> qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it might very well be found to be evidence of most persuasive character.

Johnson, 333 U.S. at 13, 68 S.Ct. at 369.

In *United States v. Ogden,* 572 F.2d 501, 502 (5th Cir.1978), the court said that:

> The agent's identification of the odor of marijuana is enough to support probable case to search. *See, e.g., United States v. Villarreal,* 5 Cir., 1978, 565 F.2d 932, 937. No warrant is required for the search of an automobile under such circumstances.

And, in *United States v. Rivera,* 595 F.2d 1095, 1099 (5th Cir.1979), the court noted that "[i]t is well settled that detection of the odor of marijuana furnishes probable cause to search a vehicle."

Thus, a complaint that TCNICU has a custom and practice to prepare affidavits and cause issuance and execution of search warrants predicated on no more that detection of odors

associated with illegal drug manufacturing does not state a cause of action. This provides a self-sufficient, independent reason for dismissal of the "odor" theory of recovery.

Viewing the Matter from a Rule 56 Perspective

If the court were to overlook the pleading inadequacies, plaintiffs nevertheless would be unable to clear the hurdle created by the Rule 56 motion.

In *McKee v. City of Rockwall, Texas,* 877 F.2d 409 (5th Cir.1989), the Fifth Circuit considered an action against a public entity under section 1983 in a summary judgment context. The claim of McKee was based on an alleged policy of the Rockwall police department discouraging arrests in domestic violence cases, which McKee contended discriminated against women. In the course of discussing McKee's summary judgment burden on the issue of whether the police department had a discriminatory policy, the court explained:

> McKee must present some evidence of such a policy in order to survive the

> defendants' summary judgement motion. When the nonmovant fails to make a sufficient showing on an essential element of her case, the moving party is entitled to summary judgment "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."

Id. at 414-15 (quoting ... *Celotex Corp. v. Catrett,* 447 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

While applying *City of Canton*[3] to a claim of individual liability rather than a claim public entity liability, the Third Circuit in *Sample v. Diecks,* 885 F.2d 1099 (3rd Cir.1989), provided a helpful discussion of the degree of proof that must be brought to bear by a plaintiff in order to avoid a summary disposition. The court said:

> Based on *City of Canton,* we conclude that a judgment could not properly be entered against Robinson in this case based on supervisory

[3] City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

> liability absent an identification by Sample of a specific supervisory practice or procedure that Robinson failed to employ and specific findings by the district court that (1) the existing custom and practice without that specific practice or procedure created an unreasonable risk of prison overstays, (2) Robinson was aware that this unreasonable risk existed, (3) Robinson was indifferent to that risk, and (4) Diecks' failure to assure that Sampie's complaint received meaningful consideration resulted from Robinson's failure to employ that supervisory practice or procedure....
>
> On remand, the district court should bear in mind that under the teachings of *City of Canton* it is not enough for a plaintiff to argue that the constitutionally cognizable injury would not have occurred if the superior had done more than he or she did. The district court must insist that Sample identify specifically what it is that Robinson failed to do that evidences his deliberate indifference. Only in the context of a specific defalcation on the part of the supervisory official can the court assess whether the official's conduct evidenced deliberate indifference and

> whether there is a close causal relationship between the "identified deficiency" and the "ultimate injury."

885 F.2d at 1118.

In *Oklahoma City v. Tuttle,* 471 U.S. 808, 823-24, 105 S.Ct. 2427, 2436-37, 85 L.Ed.2d 791 (1985), the Supreme Court emphasized the burden of proof in a case where liability is sought to be imposed under *Monell* [4], saying:

> Here the instructions allowed the jury to infer a thoroughly nebulous "policy" of "inadequate training" on the part of the municipal corporation from the single incident described earlier in this opinion, and at the same time sanctioned the inference that the "policy" was the cause of the incident. Such an approach provides a means for circumventing Monell's limitations altogether. Proof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal

[4] Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

> policy, which policy can be attributed to a municipal policymaker. Otherwise the existence of the unconstitutional policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation. Under the charge upheld be the Court of Appeals the jury could properly have imposed liability on the city based solely upon proof that it employed a nonpolicymaking officer who violated the Constitution. The decision of the Court of Appeals is accordingly reversed.

And, the heavy burden of proof to be borne by plaintiff in a case such as this was again recognized in *Pembaur v. Cincinnati,* 475 U.S. 469, 483-84, 106 S.Ct. 1292, 1300-01, 89 L.Ed.2d 452 (1986):

> We hold that municipal liability under section 1983 attaches where---and only where---a deliberate choice to follow a course of action is made from among various alternatives by the official or

> officials responsible for establishing final policy with respect to the subject matter in question. See *Tuttle,* supra [471 U.S.] at 823, 85 L.Ed.2d 791, 105 S.Ct. 2427 [at 2436] ("policy' generally implies a course of action consciously chosen from among various alternatives").

The only evidentiary items adduced by plaintiffs in response to the Rule 56 motion are the affidavits of plaintiffs Charlene Leatherman, Travis Leatherman, Gerald Andert, Donald Andert, Kevin Lealos and Jerri Lealos and the report of persons who apparently were hired by the attorneys for the plaintiffs to interview the Andert/Lealos plaintiffs. Those items deal with the facts of the specific incidents about which plaintiffs complain, and damages allegedly flowing to plaintiffs as a consequence of those incidents, but shed no light whatsoever on the factors that are so crucial to establishment of section 1983 liability against a public entity. Plaintiffs simply have not come forward with any evidence to satisfy the summary judgement burden that was cast on them once

defendants made their Rule 56 challenge. At most, plaintiffs might have raised issues of impropriety on the part of the individual officers who participated in the raids. Quite clearly, this does not create an issue of liability on the part of the public entity defendants. The Supreme Court emphasized in its *Monell v. New York City Department of Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), opinion that a public entity is not liable solely because it employs a tortfeasor:

> On the other hand, the language of section 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor---or, in other words, a municipality cannot be held liable under section 1983 on a respondeat superior theory.
>
> ....
>
> We conclude, therefore, that a local government may not be sued under section 1983 for an injury inflicted

solely by its employees or agents.

Id. at 691, 694, 98 S.Ct. at 2036, 2037.

Thus, if the potential of dismissal is viewed from a summary judgement standpoint, the same result obtains---plaintiffs' claims should be dismissed.

Even though Grapevine and Lake Worth are not summary judgment movants, the record of this case makes appropriate *sua sponte* summary rulings by the court in favor of those defendants. The same reasons why summary rulings should be made for TCNICU and Tarrant exist as to the claims by plaintiffs against Grapevine and Lake Worth. Plaintiffs have had ample opportunity to come forward with evidence in support of their claims of public entity liability against all defendants, and have had sufficient notice that they must bring their evidence forward or suffer dismissals. *See Catrett v. Johns--Manville Sales Corp.*, 756 F.2d 181, 189 (Bork, J., dissenting) (D.C.Cir.1985), *rev'd sub nom. Celotex Corp v. Catrett*, 477 U.S. 317, 326, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986) (citing Bork dissent with approval).

Other Grounds of the Defense Motions

The motions of TCNICU, Curry, in his official capacity, Tarrant, and Carpenter, in his official capacity, state grounds for dismissal that are not discussed in this memorandum opinion. The court has not been required to consider any of those other grounds in order to reach the conclusion that all of plaintiffs' claims should be dismissed.

Request of Plaintiffs Pursuant to Rule 56(f)

At pages 24-25 of their reply in opposition to the second motions of TCNICU, et al, to dismiss and for summary judgment, plaintiffs say that the motion for summary judgment should be denied pursuant to Fed.R.Civ.P. 56(f) "for the reason that Plaintiffs, as non-moving parties, have not had a reasonable opportunity to discover information that is essential to their opposition to the Defendants' Motion." The argument made by plaintiffs on this subject, and the supporting affidavit of attorney Gladden, rely on the circumstance that no documents have been produced pursuant to a document production request that was served by

plaintiffs on TCNICU and Tarrant in May 1990.

The court is not persuaded by plaintiffs' arguments. This suit was filed in December 1989, and plaintiffs have had ample opportunity to engage in full discovery since then. The document production request to which plaintiffs refer is limited to documents that indicate the results of execution of search warrants, since the formation of TCNICU, that were initiated because of the detection of odors associated with the operation of an illegal drug manufacturing laboratory. Obviously, any inability of plaintiffs to acquire documents bearing on that limited subject provides no excuse for failure of plaintiffs to develop evidence in response to the motion for summary judgment, if any was available to be had. Plaintiffs have known since December 1989, when TCNICU and Tarrant filed their first motion for summary judgment, that there was a need to develop and put in the record whatever summary judgment evidence could be developed in support of plaintiffs' claims.

If plaintiffs' allegations are factually based,

plaintiffs' counsel are presumed to have had knowledge of the factual basis when they signed the original and amended complaints. *See* Fed.R.Civ.P. 11. In *Rodriguez v. Avita,* 871 F.2d 552, 554 (5th Cir.1989), the court took into account the requirements of Rule 11 in giving an explanation of the strict pleading requirements in a case of this kind:

> Long before the filing of the pleading quoted above, it had been laid down as the law of our Circuit that in "cases invoking 42 U.S.C. section 1093 we consistently require the claimant to state specific facts, not merely conclusory allegations." *Elliott v. Perez,* 751 F.2d 1472, 1479 (5th Cir.1985), and see authorities from this and other circuits cited at note 20. Cases such as *Elliott,* where the immunity to suit of governmental officials is at stake, present a special and acute subset of the general run. In view of the enormous expense involved today in litigation, however, of the heavy cost of responding to even a baseless legal action, and of Rule 11's new language requiring reasonable inquiry into the facts of the case by an attorney *before* he brings an

> action, applying the stated rule to all section 1983 actions has much to recommend it. There can be scant imposition, after all, in requiring a pleader who has already inquired into the facts of his case to replead his understanding of them, as our authorities cited have often suggested....

Order

For the reasons given above, the court is ordering that all claims of all plaintiffs against any defendant are dismissed. A separate judgment of dismissal, finally disposing of this action, is being signed contemporaneously with the signing of this memorandum opinion and order.

STATUTES AND RULES INVOLVED

Section 1983, Title 42, United States Code provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

Rule 8 of the Federal Rules of Civil Procedure provides in parts pertinent to this petition:

> (a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain (1) grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief

in the alternative or of several different types may be demanded.

* * *

(e) Pleading to be concise and Direct: Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.

Title 28, United States Code, Section 2072 provides:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for purposes of appeal under section 1291 of this title.